BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOOD RIVER VALLEY RESIDENTS COMMITTEE,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

APOLLO LAND HOLDINGS, LLC,
Intervenor-Respondent.

LUBA No. 2017-014

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Meriel L. Darzen, Bend, filed the petition for review and argued on behalf of petitioner.

Wilford K. Carey, Hood River, filed a response brief and argued on behalf of respondent. With him on the brief was Annala, Carey, Thompson, VanKoten & Cleaveland, P.C.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Seth King and Perkins Coie LLP.

RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Chair, concurring.

REMANDED 06/29/2017

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners' decision approving a site plan for a 50-room hotel on land that is subject to an exception to Statewide Planning Goal 4 (Forest Land), and designated and zoned Industrial.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to alleged new matters raised in the response brief that argue that certain issues raised in the petition for review are waived. There is no objection to the reply brief, and it is allowed.

FACTS

Intervenor-respondent Apollo Land Holdings, LLC (intervenor) owns a 32.64-acre property that is located approximately 500 feet southwest of the intersection of Lost Lake Road and Dee Highway. The property is the site of a former mill, known as the Dee Hardboard Mill.[1] In 1984, the county adopted an exception to Goal 4 for the subject property and additional property adjacent to it, totaling approximately 93 acres (Dee Mill Exception).[2] Record 242, 247. The Dee Mill Exception was adopted as part of the county's adoption of the

[1] In 2014, the county approved intervenor's site plan review application to develop an amphitheater for outdoor music concerts, festivals, weddings, and other commercial events on the property. Record 21.

[2] The subject property contains soils classes that qualify it as forest land. Record 47.

Hood River County Comprehensive Land Use Plan (HRCP) that was submitted to LCDC for acknowledgement in 1984. The HRCP also designated the subject property Industrial in the HRCP and zoned it Industrial (M1). The relevant portion of the HRCP, including the Dee Mill Exception, and the county's zoning ordinance were acknowledged in 1988. We discuss the history of that acknowledgement process in more detail below.

In 2016, intervenor applied for site plan review approval to construct a 50-room hotel on a portion of the property. The planning director approved intervenor's site plan, and petitioner appealed the planning director's decision to the planning commission. The planning commission reversed the planning director's decision and denied the application, and intervenor appealed that decision to the board of county commissioners. The board of county commissioners reversed the planning commission's decision and approved the application. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

The central issues presented in these three assignments of error are whether and to what extent (1) Statewide Planning Goal 14 (Urbanization) and (2) OAR 660-004-0018, an LCDC administrative rule, apply to intervenor's application for site plan review for the proposed hotel. As we set out in more detail below, the board of commissioners did not apply OAR 660-004-0018 to the application, concluded that the proposed hotel use is authorized by the Dee Mill Exception, and concluded that Goal 14 does not apply to the application.

A. The Dee Mill Exception

The county originally adopted the Dee Mill Exception as part of its Central Valley Plan in 1980, and re-adopted it in 1984 as part of the HRCP submitted to LCDC for acknowledgement. The Central Valley Plan explains that the background report for the plan identified a "limited industrial expansion" at the Dee Mill site.

The "Background Data" for the Dee Mill Exception included in the HRCP describes the Dee Mill exception area as:

> "28+ acres are the site of the Dee Hardboard Plant and associated pond, sawdust piles, etc. 39+ acres are within the established floodplain of the East Fork Hood River or are on extreme slopes and unusable for development. The remaining 26+ acres are available for expansion of the current use or other industrial uses [.]" Record 47.

The Background Data also state that the planning and zoning of the property are Industrial: "Plan/Zoning: Industrial/M-1." As we explain in more detail below, the M1 zone allows "any use permitted in a C-1 zone." Hood River County Zoning Ordinance (HRCZO) 31.10.A. The county's C1 zone in turn allows "[c]ommercial and professional service establishments unless otherwise listed." HRCZO 21.10.C.

The "Recommendation" in the Background Data provides:

> "The Background Data above indicates that approximately 72% of the land designated for industrial use is either committed or is undevelopable due to terrain or floodplain. The adjacent undeveloped lands in the same ownership can be allowed for expansion purposes.

> "The Exception from Goal 4 should be supported and the above information added to the Background Document." Record 48.

B. The County's Decision

The board of county commissioners concluded that the M1 zone allows the proposed hotel use outright as "commercial and professional service establishments unless otherwise listed." Record 10. The board of county commissioners interpreted the Dee Mill Exception as authorizing the proposed hotel because (1) the Exception authorized "expansion" of the industrial uses on the site and (2) the Dee Mill Exception references the M1 zoning. Record 10.

The board of county commissioners also concluded that it was not required to consider whether the proposed hotel is consistent with Goal 14 or take an exception to Goal 14 to allow the proposed hotel use. Record 11. The commissioners reasoned that LCDC's acknowledgement of the Dee Mill Exception and the M1 zone means that all uses allowed in the M1 zone are deemed to comply with all of the goals, including Goal 14. Record 9. The board of county commissioners did not address petitioner's arguments, presented below, that OAR 660-004-0018 applies to the application and requires a new exception.

C. Third Assignment of Error

Goal 14 prohibits urban uses on rural land without an exception to Goal 14. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724

P2d 268 (1986).[3] "Rural Land" is defined in the Statewide Planning Goal definitions as "[l]and outside urban growth boundaries that is: (a) Non-urban agricultural, forest or open space, (b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or (c) In an unincorporated community." The Dee Mill Exception allowed the property to be planned and zoned for uses that are otherwise not allowed on Goal 4 forest land. However, the county did not seek, and LCDC did not approve, an exception to Goal 14 for the subject property, and it remains Rural Land.

In its third assignment of error, petitioner argues that an exception to Goal 14 is required in order to site the proposed hotel, because the hotel is an urban use of rural land. Petitioner argues that the board of commissioners improperly construed the Dee Mill Exception and the M1 zone to allow the hotel contrary to Goal 14, and LUBA is not required to affirm the board of commissioners' interpretation, pursuant to ORS 197.829(1)(d). *See* n 5.

Intervenor and the county (together, respondents) respond that the board of commissioners correctly determined that Goal 14 does not apply to the

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[3] In *Curry County*, the Supreme Court indicated that certain factors could be considered in determining whether a use is urban or rural: (a) the size of the area in relationship to the developed use (density); (b) its proximity to an acknowledged urban growth boundary (UGB) and whether the proposed use is likely to become a magnet attracting people from outside the rural area; and (c) the types and levels of services which must be provided to it. *Id*. at 505, 507.

proposed site plan and that the site plan did not require an exception to Goal 14 because (1) the M1 zone has been acknowledged to comply with Goal 14, and (2) the M1 zone allows the proposed hotel use as a use permitted outright. Accordingly, respondents respond, citing *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983) and *Friends of Neabeack Hill*, 139 Or App 39, 911 P2d 350 (1996), that petitioner's arguments are a collateral attack on the acknowledged M1 zone.

Once county comprehensive plans and land use regulations are acknowledged, review of proposed development is for compliance with the acknowledged plan and land use regulations. ORS 197.175(2)(d). However, there are a few problems with respondents' position as it applies in the present appeal.

The main problem with respondents' argument involves LCDC's acknowledgement of the Dee Mill Exception, the HRCP, and the M1 zone. An LCDC acknowledgement order is judicially cognizable law. *Delta Prop. Co. v. Lane County*, 69 Or LUBA 305, 308-09 (2014); *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 530 (1999), *modified* 165 Or App 1, 994 P2d 1205 (2000); *DLCD v. Klamath County*, 24 Or LUBA 643, 646 (1993). LCDC initially acknowledged the HRCP, including the Dee Mill Exception, and the HRCZO in December 1984. LCDC Compliance Acknowledgement Order, 84-ACK-388 (December 14, 1984). That decision was appealed to the Court of Appeals, which reversed and remanded LCDC's decision based on errors in

LCDC's Goal 5 analysis, and rejected all of the other challenges. *1000 Friends of Oregon v. LCDC (Hood River County)*, 91 Or App 138, 754 P2d 22 (1988).

LCDC subsequently adopted a Continuance Order on July 15, 1988. That continuance order incorporated by reference the findings LCDC adopted in support of the December 1984 acknowledgement order, and acknowledged all provisions of the HRCP and the zoning ordinance except the provisions related to the Goal 5 issue that was remanded by the Court in its decision. We take official notice of the July 15, 1988 continuance order.

Based on that continuance order, we conclude that as a matter of law LCDC did not acknowledge the Industrial plan designation or the M1 zone as complying with Goal 14. The findings in support of the 1984 acknowledgement order and the 1988 continuance order, which are incorporated by reference into the orders, provide that "[g]oals 14-19 are not applicable." 84-ACK-388, at 3. In a section of the findings responding to objections lodged by 1000 Friends of Oregon, the findings further provide:

> "On October 30, 1981, the Commission found the Goal 14 portion of the Hood River County Plan would be addressed by the City of Hood River and City of Cascade Locks submittals in the treatment of their UGBs.
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> " * * * * *
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> " * * * *Hood River County has appropriately applied its rural zoning to exception areas which have been justified as physically developed or irrevocably committed to nonresource use. Future application of these zones will require exception to any applicable resource zones and Goal 14 if urban uses are proposed*." *Id*. at 78. (Emphasis added).

The findings make clear that as a matter of law, LCDC did not acknowledge the M1 zone, which the findings characterize as "rural zoning" that was applied to exception areas, to comply with Goal 14. Rather, LCDC apparently understood the uses authorized by the M1 zone would be limited to rural uses, or, stated differently, uses that are appropriate outside an urban growth boundary. Because LCDC did not acknowledge the M1 zone to comply with Goal 14, the M1 zoning of the property does not allow urban use of the subject property, which remains Rural Land. Accordingly, respondents' initial position—that the M1 is acknowledged to comply with Goal 14—is incorrect. Accordingly, as the exception itself indicates, in applying the M1 zone to the exception area the county must ask and answer whether "urban uses are proposed."[4] 84-ACK-388, at 78. If a proposed use is an urban use, then the county cannot approve the use without taking an exception to Goal 14.

Second, as we explain in more detail below, LCDC has adopted a comprehensive set of rules that apply to proposed changes in the use of

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[4] We note that one of the county's zones, the Rural Unincorporated Community zone, allows "[m]otels and hotels, up to 35 units, if served by a community sewer system." That provision implements OAR 660-022-0030, the administrative rule governing planning and zoning of unincorporated communities. That administrative rule "interprets Goals 11 and 14 concerning urban and rural development outside urban growth boundaries * * *." OAR 660-022-0000(2). In our view, relevant context for determining whether the 50-unit hotel proposed in the present case is a rural or urban use, for purposes of OAR 660-004-0018 and Goal 14, includes both OAR 660-022-0030 and the county's unincorporated community zone that allows hotels on rural land under limited circumstances.

property that is subject to an acknowledged physically developed or irrevocably committed exception. We conclude below that the county must consider whether OAR 660-004-0018(2)(b) and (3) require a new reasons exception for the proposed hotel. OAR 660-004-00018(2)(b)(A) in particular requires a new reasons exception unless the proposed use will "maintain the land as 'Rural Land' as defined by the goals, and are consistent with all other applicable goal requirements." That inquiry incorporates the requirements of Goal 14.

The third assignment of error is sustained.

D. First and Second Assignments of Error

In its first assignment of error, petitioner argues that the Dee Mill Exception does not allow the proposed hotel use, and the county's interpretation of the Dee Mill Exception and the M1 zone that was applied to the property as authorizing the proposed hotel is inconsistent with the express language of the Dee Mill Exception, the purpose of the Dee Mill Exception, and with other provisions of the HRCP. In its second assignment of error, petitioner argues that OAR 660-004-0018 requires the county to evaluate whether a new exception is required to site the proposed hotel. We address these assignments of error together.

1. The County's Interpretation of the Dee Mill Exception

According to petitioner, the express language of the Dee Mill Exception authorized use of the site for the existing use as a mill and expansion of that

mill but did not authorize the hotel use. Petitioner argues that the reference in the Dee Mill Exception to the property's Industrial plan designation and M1 zoning does not expand the uses authorized by the Dee Mill Exception to allow a 50-room hotel. Petitioner also points to language in the Central Valley Plan that explains that "[t]he * * * Dee Mill site[], as mentioned previously, [is] largely committed to industrial uses. Whatever industrial expansion occurs at these sites will likely be done only by the existing mills on the sites." Record 50.

Petitioner also argues that the purpose of the Dee Mill Exception and corresponding assignment of M1 zoning to the subject property was to recognize the existing mill use of the property and authorize potential expansion of that industrial use due to irrevocable commitment of the property to non-resource uses, not to allow a wide range of *commercial* uses that are not contemplated by the Dee Mill Exception. Accordingly, petitioner argues, the county's decision that the M1 zoning of the property allows the use is inconsistent with the purpose of the Dee Mill Exception and with the Central Valley Plan.

Respondents emphasize the M1 zoning applied to the property. Respondents rely on the statement in the Dee Mill Exception that specifically refers to the Industrial plan designation and M1 zoning of the property, and argue that the references in the exception to "industrial" uses means that all uses in the M1 zone are authorized by the Dee Mill Exception, including

commercial uses. Respondents maintain that the express language of the Dee Mill Exception does not prohibit other uses of the site other than the existing mill or expansion of the mill, or prohibit commercial uses. Accordingly, respondents argue, the county's interpretation of the M1 zoning of the property as allowing the use is not inconsistent with the Dee Mill Exception. Respondents argue that the county's interpretation of the Dee Mill Exception and the M1 zone as allowing the proposed hotel must be affirmed under ORS 197.829(1)(a) and (b) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

ORS 197.829(1) provides the standard of review that LUBA must apply to a local government's interpretation of its comprehensive plan and land use regulations.[5] If the subject property did not involve land for which an exception

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[5] ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

to Goal 4 was adopted into the HRCP and acknowledged pursuant to ORS 197.732, Statewide Planning Goal 2 (Land Use Planning) and the LCDC rules governing exceptions, the deferential standard of review in ORS 197.829(1)(a) and (b) might require that we affirm the county's interpretation. There is some language in the Dee Mill Exception that tends to support the county's interpretation of it.

However, the Dee Mill Exception and the corresponding M1 zoning applied to the property as a result of the exception implemented the exception statutes at ORS 197.732, Statewide Planning Goal 2, and the rule that implements the exception statutes and Goal 2 at OAR 660-004-0018. Under ORS 197.829(1)(d), LUBA is not required to affirm a county interpretation of an exception that is contrary to the exception statutes and LCDC's implementing rules. ORS 197.829(1)(d); *Leathers v. Marion County*, 144 Or App 123, 130, 925 P2d 148 (1996); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 589 n 2, 842 P2d 441 (1992). In *Leathers*, the court rejected the applicant's argument that because the previous Goal 3 exception and zoning were adopted by ordinance, ORS 197.829(1)(a) required LUBA to affirm the local government's interpretation of those ordinances. 144 Or App at

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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

130. The court held that if the local government's interpretation of the ordinances that relied on the exception would allow different uses without any required further exceptions having been taken, it is reversible under ORS 197.829(1)(d) as "contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements." *Id*.

We conclude that the county's interpretation of the Dee Mill Exception and the M1 zoning as authorizing the proposed hotel use is contrary to the exception statutes and the rule that implements the exception statutes at OAR 660-004-0018, for the reasons explained below. An exception to resource goals may be taken if "[t]he land subject to the exception is irrevocably committed as described by [LCDC] rules to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable[.]" ORS 197.732(2)(b). An "[e]xception" is "a comprehensive plan provision that * * * is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability[.]" ORS 197.732(1)(b).

The county's interpretation of the Dee Mill Exception as allowing all uses on the exception site that are allowed in the M1 zone comes close to establishing a "zoning policy of general applicability" for the exception site. The county's elevation of the single statement in the Dee Mill Exception that M1 zoning is applied to the property to determinative status also fails to give effect to other language repeated throughout in the Dee Mill Exception and the

Central Valley Plan that provides relevant context for interpreting the uses allowed by the M1 zoning. The exception for the 93-acre site was taken to allow the existing industrial use of approximately 28 acres of the exception area on which the mill was sited in order for the mill to continue, and to allow the potential for expansion of that mill use onto the remaining 65 acres, some of which the exception recognizes are not developable. Nothing in the language of the Dee Mill Exception or the Central Valley Plan authorizes the use of the property for a hotel.

In addition, the M1 zoning of the property that is referenced in the Dee Mill Exception does not unambiguously authorize the hotel use. Rather, it allows the uses allowed in the C1 zone, which includes the generally described use category "commercial and professional service establishments unless otherwise listed." HRCZO 21.10.C. The meaning of "unless otherwise listed" is similarly obscure. It may refer to other uses listed in the C1 zone, or it may also refer to specific commercial establishments listed in other zones.[6] As

[6] As noted previously, certain county zones expressly allow small hotels on rural land, subject to limitations that implement OAR 660-022-0030, Goal 11 and Goal 14. The C1 zone is not one of those zones. A straightforward way to ensure that the C1 zone (and the referring M1 zone) is consistent with the county's zoning scheme and OAR 660-022-0030, Goal 11 and Goal 14, is to interpret the ambiguous language "unless otherwise listed" to exclude commercial establishments, such as hotels, that are specifically listed in other rural zones. Under this view, the apparent conflict in the present case between the C1 and M1 zones and Goal 14 disappears. However, no party in this case disputes that the C1 zone allows hotels under the category of "commercial and professional service establishments[.]" Accordingly, for purposes of this

discussed below, a local government generally cannot interpret a code provision in a manner that is contrary to an applicable goal or administrative rule, if the code provision can be interpreted consistently with the applicable goal or rule.

Respondents' reliance on *Friends of Neabeack Hill* is similarly unpersuasive. *Friends of Neabeack Hill* involved an application to subdivide residentially planned and zoned property that was reviewed during the city's Statewide Planning Goal 5 ESEE identification process and subsequently zoned and designated for residential development when it was annexed into the city. 139 Or App 39, 41. The property at issue in *Friends of Neabeack Hill* was not at any time subject to a physically developed, irrevocably committed, or reasons exception to any statewide planning goal. *Id*. at 41-42. The property was zoned residential, and a city comprehensive plan policy expressly provided that the property could be residentially developed.

Conversely, this appeal involves exception land, for which LCDC has adopted a comprehensive set of rules that limit future changes to the use of exception land without taking a new exception or exceptions. The plan policy at issue in *Friends of Neabeack Hill* had been acknowledged by LCDC to comply with Goal 5. The Court of Appeals in *Friends of Neabeack Hill* rejected what it characterized as *de facto* Goal 5 challenge of the acknowledged

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opinion we assume, without deciding, that the C1 zone (and hence the M1 zone) allows the proposed 50-unit hotel.

plan policy. The Court of Appeals rejected the petitioners' attempt to characterize that *de facto* direct challenge of the acknowledged plan policy as a challenge of an interpretation of the plan under ORS 197.829(1)(d). The Court of Appeals explained:

> "[w]e conclude that a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835. Situations undoubtedly will arise where that rule will prove difficult to apply. The line between an interpretation and the provision it interprets will not always be sharp." 139 Or App at 49.

In a footnote, the Court noted that there are situations where the acknowledged legislation is capable of an interpretation and application that is fully consistent with the goals and rules, but the local interpretation and application is not consistent with the goals and rules, and gave an example. *Id*. at n 7.

This is one of those situations. The Dee Mill Exception, and the deeply ambiguous M1 zoning applied to the property pursuant to the exception, are capable of an interpretation and application that is fully consistent with the exception statutes as implemented by the Dee Mill Exception, and with LCDC's rules and Goal 14, and the county must interpret the Dee Mill Exception and the M1 zone in a manner that is not contrary to the exception statutes, LCDC's rules and Goal 14. *Leathers*, 144 Or App at 130-31.

OAR 660-004-0018 also provides relevant context for interpreting the Dee Mill Exception.[7] OAR 660-004-0018(3) provides in relevant part:

> "Uses, density, and public facilities and services not meeting section (2) of this rule may be approved on rural land only under provisions for a reasons exception as outlined in section (4) of this rule and applicable requirements of OAR 660-004-0020 through 660-004-0022, 660-011-0060 with regard to sewer service on rural lands, OAR 660-012-0070 with regard to transportation improvements on rural land, or OAR 660-014-0030 or 660-014-0040 with regard to urban development on rural land." (Emphasis added.)

OAR 660-004-0018(2) of the rule in turn provides in relevant part:

> "For 'physically developed' and 'irrevocably committed' exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those that satisfy (a) or (b) or (c) and, if applicable, (d):
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> "(a) That are the same as the existing land uses on the exception site; [or]
>
> "(b) That meet the following requirements:
>
> "(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land' as defined by the goals, and are consistent with all other applicable goal requirements;
>
> "(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource

[7] As we explain in detail below, in 1986, LCDC adopted the more or less current version of OAR 660-004-0018 to implement in part ORS 197.732.

land to uses not allowed by the applicable goal as described in OAR 660-004-0028; and

"(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]" (Emphasis added.)

OAR 660-004-0018(1) provides the purposes of the rule:

> "Purpose. *This rule explains the requirements for adoption of plan and zone designations for exceptions.* Exceptions to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception. Physically developed or irrevocably committed exceptions under OAR 660-004-0025 and 660-004-0028 and 660-014-0030 are intended to recognize and allow continuation of existing types of development in the exception area. *Adoption of plan and zoning provisions that would allow changes in existing types of uses, densities, or services requires the application of the standards outlined in this rule*." (Emphases added.)

OAR 660-004-0018(3) makes reasonably clear that a proposed different *use* of land from the use for which an exception was originally taken may be "approved" only if the proposed new use is consistent with maintaining the exception area as "rural land," pursuant to OAR 660-004-0018(2)(b). The county's interpretation of the Dee Mill Exception and the M1 zone as allowing the proposed hotel use without consideration of whether the new use will "maintain the land as Rural Land" is not consistent with OAR 660-004-0018(3). As we explain below, the county must apply OAR 660-004-0018(2)(b)(A) – (C) to the proposed new use of the exception site.

The first assignment of error is sustained.

2. OAR 660-004-0018(2)(b) Applies Directly

In its second assignment of error, petitioner argues that OAR 660-004-0018(2)(b) requires an exception to site the proposed hotel or requires the county to explain why no new exception is required. Respondents maintain that OAR 660-004-0018 does not apply to its application to site a hotel. First, respondents argue that the rule applies only to the enactment of the *initial* local plan and zone designations for areas subject to a physically developed or irrevocably committed exception, or where a plan amendment or zone change for property subject to the exception is later proposed to accommodate new uses. Second, respondents argue that the M1 zone is acknowledged to comply with all statewide planning requirements, and therefore no LCDC rules apply to its site plan review application.

As we explain above in our resolution of the third assignment of error, the M1 zone was not acknowledged to comply with Goal 14, and therefore the rules that apply to and restrict urban uses on rural land apply to intervenor's site plan review application. In addition, although subsection (1) of the rule contains language emphasized in italics above which, read in isolation, could be construed to suggest that the rule applies *only* in circumstances when a local government is initially zoning or subsequently changing the plan or zone of property that is subject to an exception, that reading fails to consider the other purposes of OAR 660-004-0018(1), which provide that "physically developed and irrevocably committed exceptions * * * are intended to recognize and

allow continuation of existing types of development in the exception area," and that "[e]xceptions to one goal * * do not authorize uses * * * or activities other than those recognized or justified by the applicable exception." That reading also fails to give full effect to other language in subsections (2) and (3) of the rule, underlined above.

OAR 660-004-0018 was initially adopted by LCDC in 1983, and provided:

> "Changes to Acknowledged Exceptions
>
> "(1) When a jurisdiction changes the types or intensities of uses or zones allowed in an exception area which the Commission has previously acknowledged and when the new use or uses would have a substantial impact upon adjacent uses, a new or modified exception is required.
>
> "(2) A new or modified exception is not required where the changed uses or zones were clearly identified and authorized by the previously excepted acknowledged exception."

That is the version that was in effect when the county adopted the Dee Mill Exception into the HRCP.[8]

In 1986, LCDC amended the rule, and that is the version that was in effect when the Dee Mill Exception and the Industrial designation and zoning of the property were acknowledged in 1988. That version adopted the more or less current version of the rule. LCDC amended the rule to overrule two LUBA

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[8] Petitioner moves that we take official notice of the 1983 version of OAR 660-004-0018. Intervenor does not object to the motion. The motion is granted.

decisions that interpreted the rule in a way that LCDC apparently viewed as incorrect. In *Cook v. Yamhill County*, 14 Or LUBA 78 (1985), LUBA held that OAR 660-004-0018(1983) did not apply at all to a zoning map amendment to permit construction of a winery when the original zoning was adopted pursuant to an irrevocably committed exception to a resource goal, as opposed to a built exception or a reasons exception. In *Confederated Tribes v. Wallowa County*, 14 Or LUBA 92, 103 (1985), LUBA held that in considering under OAR 660-004-0018(1)(1983) whether "new uses [allowed in an exception area] would have a substantial impact upon adjacent uses" the rule required an assumption that the most intensive uses allowed in the zone would be developed.

LCDC's 1986 rule amendments administratively overruled LUBA's interpretation of the prior version of the rule in *Cook*, which held that for an irrevocably committed type of exception, no new exceptions were ever required to rezone for additional use. In addition, the 1986 rule amendments effectively overruled *Confederated Tribes*, which held that the new zoning applied to an exception area would be assumed to allow all uses. LCDC adopted the more or less current version of the rule that requires (1) "plan and zone designations" for physically developed or irrevocably committed exception areas to limit uses on the property to uses that are the same as the existing uses or to rural uses, and (2) "uses" that were not the same as existing uses or that were not rural uses to be "approved" only through the reasons exception process. OAR 660-004-0018(2)(1986). Under the current version of OAR 660-004-0018(3), we

believe that the rule applies directly to a proposed change in the use of an exception area, where (1) the proposed change in use is one that will arguably no longer maintain the exception area as rural land, and (2) the zone applied to the exception area does not unambiguously allow urban uses of the exception area.

Finally, in *Leathers*, like the present appeal, no plan amendment or zone change was proposed concurrently with a site plan. LUBA applied OAR 660-004-0018(3)(1986) directly and concluded that the rule required a new reasons exception for *uses* included on the site plan because the site plan proposed a change in either the type or intensity of the use allowed by a previous reasons exception and zoning as Interchange District (ID). 144 Or App at 130. The Court of Appeals upheld LUBA's conclusion that the *uses* proposed by the site plan required a reasons exception. Although respondents attempt to distinguish *Leathers* because it involved a reasons exception, and not a physically developed or irrevocably committed exception, OAR 660-004-0018(3)(1986) paralleled (and parallels today) the rule at OAR 660-004-0018(2)(d)(1986) (now at OAR 660-004-0018(3)(2004)) that similarly required a new exception for "uses" on land subject to a physically developed or irrevocably committed exception that were not the same as the existing uses or that did not maintain the land as rural land. *See also Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545, *aff'd* 219 Or App 429, 182 P3d 325 (2008) (holding

that a conditional use permit for an RV Park in the recreation zone required an exception to Goal 14 because the RV Park proposed urban uses).

OAR 660-004-0018(3) requires the county to determine under OAR 660-004-0018(2)(b) whether the proposed hotel use is a "rural use[] * * * that will maintain the land as 'Rural Land' * * * and [is] consistent with all other applicable goal requirements[.]" If the proposed hotel use under the current M1 zoning designation does not maintain the land as Rural Land, then a new reasons exception and satisfaction of the other requirements is required, pursuant to OAR 660-004-0018(3).

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

In its fourth assignment of error, petitioner argues that the county erred in failing to adopt findings addressing Statewide Planning Goal 11 (Public Facilities). According to petitioner, intervenor proposes to establish a sewer system outside of an urban growth boundary, which is generally prohibited without an exception to Goal 11. The county's findings do not address the applicability of Goal 11 or OAR 660-011-0060, the administrative rule implementing Goal 11.

Intervenor disputes that its proposed system is inconsistent with Goal 11 because, according to intervenor, the proposed sanitary sewage treatment does not propose to serve more than one lot. *See* OAR 660-011-0060(1)(f) (defining "sewer system" as a system that serves more than one lot). On remand the

county must determine whether OAR 660-004-0018(2) and (3) require a new reasons exception, and whether the proposed hotel is an urban use that requires an exception to Goal 14. When it addresses those issues, the county can address the provisions of Goal 11 and OAR 660-011-0060, which implements Goal 11, to determine whether the proposed sewage system is consistent with the goal and rule.

We do not reach the fourth assignment of error.

FIFTH ASSIGNMENT OF ERROR

In its fifth assignment of error, petitioner argues that the county's decision that the application satisfies HRCZO 31.60, which governs site access in the M1 zone, is not supported by substantial evidence in the record.[9] According to petitioner, the county's decision relies on a traffic analysis that is not included in the record and on a letter from the Oregon Department of Transportation that does not support the decision. In addition, petitioner faults the decision for failing to include a condition of approval that is necessary in order to satisfy HRCZO 31.60.[10]

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[9] HRCZO 31.60.A requires the applicant to demonstrate that:

> "Site access will not cause dangerous intersections or traffic congestion. They will have adequate visibility for motorists and pedestrians and will be kept at the minimum needed for safe ingress and egress. Roadway capacity, speed limits and number of turning movements shall all be considered."

[10] Petitioner appealed the planning director's decision to the planning commission and argued, in addition to presenting its other arguments, that

Intervenor responds initially that petitioner is precluded from raising the issue raised in the fifth assignment of error because petitioner failed to appeal the planning commission's decision on the issue and therefore did not specify the issue as an appealed issue.[11] In the reply brief, petitioner responds that the HRCZO does not require an appellant to specify the issues raised on appeal and therefore, petitioner is not precluded from raising the issue raised in the fifth assignment of error. We agree. Petitioner also responds that even if the HRCZO required an appellant to specify the issues raised on appeal, petitioner, having prevailed before the planning commission when the planning commission denied intervenor's application, was not required to appeal that issue or the planning commission decision to the board of commissioners in order to meet the requirements of ORS 197.825(2)(a). Again, we agree.

On the merits, intervenor responds that the county's decision relies on a 2015 supplemental traffic analysis, which summarized the results of a 2014 traffic analysis that was prepared in connection with the application for an amphitheater. *See* n 1. It is the 2014 traffic analysis that petitioner points out is

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HRCZO 31.60 was not met. Although petitioner prevailed before the planning commission on its other arguments, the planning commission upheld the planning director's decision that HRCZO 31.60 was met. The board of commissioners also concluded that HRCZO 31.60 was met.

[11] In *Miles v. City of Florence*, the Court of Appeals held that ORS 197.825(2)(a) limits LUBA's review to those issues that are raised in a local appeal. 190 Or App 500, 506, 79 P3d 382 (2003), *rev den* 336 Or 615, 90 P3d 626 (2004).

not in the record. The 2015 supplemental traffic analysis explained that the 2014 analysis projected traffic impacts from the amphitheater. The supplemental traffic analysis concluded that the addition of hotel traffic to the amphitheater site is expected to be minimal compared to the amphitheater traffic, and would likely reduce the amount of amphitheater traffic since the hotel will likely almost exclusively serve concert patrons. Intervenor responds that the supplemental traffic analysis includes enough evidence for the county to conclude that HRCZO 31.60 is met even without the 2014 analysis the supplemental analysis summarized being included in the record. We agree.

Petitioner also argues that the decision is not supported by substantial evidence in the record because it fails to include a condition of approval that was included as a condition of approval of the 2014 amphitheater site plan requiring a draft traffic control plan be developed and provided to ODOT and the county engineer. However, petitioner does not develop any argument explaining why the county's failure to impose the 2014 site plan approval condition in the present proceeding means that the county's decision is not supported by substantial evidence in the record. Absent any explanation regarding the relevance of the 2014 condition of approval to HRCZO 31.60, petitioner's argument provides no basis for reversal or remand.

The fifth assignment of error is denied.

The county's decision is remanded.

Holstun, Board Chair, concurring.

I agree with the majority that the challenged decision must be remanded. But I would sustain the first and second assignments of error for different reasons than the majority. I believe the first and second assignments of error, and the reasoning necessary to resolve those assignment of error are the key to resolving this appeal. Resolving those questions requires that we answer a simple question: do the acknowledged HRCP and zoning ordinance already authorize the proposed hotel? If they do, the first and second assignments of error must be denied. If they do not, those assignments of error must be sustained. [12]

The built and committed exception for the subject property identified the then-existing Dee Mill as the existing use of the property and authorized future expansion of the Dee Mill onto adjacent vacant property and "other industrial uses" on that vacant property. Those are the only three types of uses authorized by the exception.

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[12] The majority opinion can be read to take the position that even if an acknowledged exception recognized and authorized uses beyond existing uses that justify a built or committed exception, subsequent changes to those recognized and authorized uses would require application of OAR 660-004-0018. I disagree with that reading of OAR 660-004-0018. To the extent the majority is relying on the Court of Appeals' decision in *Leathers* to support that broad reading of OAR 660-004-0018, I do not agree that *Leathers* lends any support for that broad reading. To the contrary, in *Leathers* the Court found that the decision on appeal "add[ed] to and intensifi[ed] the uses authorized by the relevant exception. 144 Or App at 126.

The M1 zoning that was applied to the subject property and acknowledged by LCDC in 1986 would allow continued industrial use of the Dee Mill site and would allow expansion of the mill onto adjacent vacant property and development of other industrial uses on that vacant property. That is no doubt why the county applied the M1 zone. But the M1 zone that was applied to the subject property and acknowledged by LCDC in 1988 does not expressly limit the uses authorized by the M1 zone to the industrial use that existed in 1988 and expansion of that industrial use or new industrial uses on to adjacent vacant property. That is no doubt because the M1 zone also applies to properties other than rural properties that are subject to a built or committed exception. Respondents take the position that the legal consequence of that lack of any express limitation on the M1 zone applied to the subject property is that the existing acknowledged comprehensive plan and zoning for the subject property already allows any use that is allowed in the M1 zone, including all uses allowed in the cross-referenced C1 zone. Stated simply, under respondents' view, the failure of LCDC to require that the M1 zone that was applied to the subject property be expressly limited to authorizing the three types of uses that were authorized by the supporting exception means that after acknowledgment in 1988 the county was free to issue permits for a large number of uses that were not even considered, let alone justified and approved,

when the exception that supports the M1 zoning was approved.[13] Petitioner on the other hand focuses almost entirely on the approved exception and assigns no significance to the lack of any express limitation on uses in the M1 zone as applied to the subject property.

We are faced with an interpretive question that does not have an easy and fully satisfactory answer. Nevertheless, I believe that under ORS 197.829(1)(a) through (d), and particularly ORS 197.829(1)(d), *see* n 5, the county is required to interpret its M1 zone to authorize only the three types of uses justified by the exception that supports that M1 zoning, despite the lack of any express language that limits the M1 zoning to those three types of uses. While that interpretation is arguably subject to the criticism that it inserts "what has been omitted," it is also the only interpretation that I can think of that gives *any* effect to the exception that was adopted as part of the comprehensive plan.[14] Under respondent's interpretation (which is a literal reading and

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[13] It is perhaps ironic that at the time the HRCP and zoning ordinance were acknowledged in 1988, OAR 660-004-0018 had recently been amended to provide that the planning and zoning for built and committed exceptions must be limited to authorizing the existing land uses, be limited to new rural uses, or if not limited to existing or rural uses be supported by a reasons exception. When LCDC acknowledged the HRCP and zoning ordinance in 1988 it presumably failed to recognize that the M1 zone lacked any such express limitation. But there is absolutely no reason to think that LCDC understood the county to propose, or intended its acknowledgement of the M1 zone for the subject property to authorize, all uses authorized by the M1 zone.

[14] ORS 174.010 provides:

application of the M1 zone without regard to the supporting exception) the exception, which is limited to three types of uses, is given no legal effect. Requiring the M1 zone to be interpreted and applied consistently with the exception "will give effect to" both the M1 zone and the exception in the HRCP. *See* n 14.

The county's legal theory in this case is that the 50-unit hotel use is a use that falls within the uses that have already been authorized by the exception and, more particularly, the M1 zoning for the subject property. If the county's legal theory were correct, I would agree that OAR 660-004-0018 simply does not apply because the county would not be approving a use that has not already been authorized by the acknowledged HRCP and zoning ordinance. But I disagree with the county's legal theory, because it is based on a misconstruction of the HRCP and zoning ordinance. Therefore, to approve the 50-unit hotel, the county will be required to apply OAR 660-004-0018. The county's failure to address OAR 660-004-0018 was error.

For the above reasons, I would sustain the first and second assignments of error.

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."